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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 STACEY D. CASE,)
7 Plaintiff,) No. CV-09-83-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on March 5, 2010 (Ct. Recs. 17,
15 22). Attorney Maureen J. Rosette represents plaintiff; Special
16 Assistant United States Attorney Leisa A. Wolf represents the
17 Commissioner of Social Security ("Commissioner"). The parties
18 have consented to proceed before a magistrate judge (Ct. Rec. 8).
19 After reviewing the administrative record and the briefs filed by
20 the parties, the court **GRANTS** Defendant's Motion for Summary
21 Judgment (Ct. Rec. 22) and **DENIES** Plaintiff's Motion for Summary
22 Judgment (Ct. Rec. 17).

23 **JURISDICTION**

24 Plaintiff protectively filed applications for disability
25 insurance benefits (DIB) and supplemental security income (SSI) on
26 May 2, 2005, alleging onset as of July 3, 2003 (Tr. 104;
27 application for DIB at Tr. 82-84; application for SSI at Tr. 737-
28

1 739). The applications were denied initially and on
2 reconsideration (Tr. 42-43, 48-51, 735-736).

3 Hearings were held February 7, 2008, and April 17, 2008,
4 before Administrative Law Judge (ALJ) Hayward C. Reed. Plaintiff,
5 represented by counsel, medical expert Armon H. Toomajian, M.D.,
6 and vocational expert Joseph A. Moisan appeared at the first
7 hearing. Only Dr. Toomajian testified before the ALJ continued the
8 hearing for a more thorough record review by the medical expert
9 (Tr. 811-827). At the supplemental hearing, plaintiff, medical
10 expert George Rodkey, M.D., and vocation expert Sharon Welter
11 testified (Tr. 830-858).

12 On July 8, 2008, the ALJ issued his decision finding
13 plaintiff not disabled as defined by the Act (Tr. 21- 35). After
14 the Appeals Council denied review (Tr. 1-6), the ALJ's decision
15 became the final decision of the Commissioner, which is appealable
16 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
17 filed this action for judicial review pursuant to 42 U.S.C. §
18 405(g) on March 17, 2009 (Ct. Recs. 2,4).

19 **STATEMENT OF FACTS**

20 The facts have been presented in the administrative hearing
21 transcript, the ALJ's decision, the briefs of both parties, and
22 are summarized here.

23 Plaintiff was 24 years old at onset (Tr. 33). She has a high
24 school education and has worked as a dishwasher, fast food worker,
25 sandwich maker, and parking lot attendant (Tr. 110,113,126,143).
26 Ms. Case alleged disability onset as of July 3, 2003, due to
27 antiphospholipid (APL) syndrome, osteoarthritis, curvature of the
28 spine, arthritis in the knees and mid back, and later,

1 fibromyalgia; she alleged the resulting pain prevented lifting her
2 toddler son, bending, sitting for long periods and required a cane
3 to walk (Tr. 28,30,139-140). The ALJ notes at the hearing, Ms.
4 Case testified she could not work due to pain since her diagnoses
5 of lupus, APL syndrome, and fibromyalgia, in addition to recent
6 neck problems (Tr. 27, referring to Tr. 833-834, 848).

7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the "Act") defines "disability"
9 as the "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental impairment
11 which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than
13 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
14 Act also provides that a Plaintiff shall be determined to be under
15 a disability only if any impairments are of such severity that a
16 plaintiff is not only unable to do previous work but cannot,
17 considering plaintiff's age, education and work experiences,
18 engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
20 Thus, the definition of disability consists of both medical and
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
22 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled.
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
26 is engaged in substantial gainful activities. If so, benefits are
27 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If
28 not, the decision maker proceeds to step two, which determines

1 whether plaintiff has a medically severe impairment or combination
2 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
3 416.920(a)(4)(ii).

4 If plaintiff does not have a severe impairment or combination
5 of impairments, the disability claim is denied. If the impairment
6 is severe, the evaluation proceeds to the third step, which
7 compares plaintiff's impairment with a number of listed
8 impairments acknowledged by the Commissioner to be so severe as to
9 preclude substantial gainful activity. 20 C.F.R. §§
10 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
11 App. 1. If the impairment meets or equals one of the listed
12 impairments, plaintiff is conclusively presumed to be disabled.
13 If the impairment is not one conclusively presumed to be
14 disabling, the evaluation proceeds to the fourth step, which
15 determines whether the impairment prevents plaintiff from
16 performing work which was performed in the past. If a plaintiff
17 is able to perform previous work, that Plaintiff is deemed not
18 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
19 At this step, plaintiff's residual functional capacity ("RFC")
20 assessment is considered. If plaintiff cannot perform this work,
21 the fifth and final step in the process determines whether
22 plaintiff is able to perform other work in the national economy in
23 view of plaintiff's residual functional capacity, age, education
24 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
25 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

26 The initial burden of proof rests upon plaintiff to establish
27 a *prima facie* case of entitlement to disability benefits.
28 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

1 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
2 met once plaintiff establishes that a physical or mental
3 impairment prevents the performance of previous work. The burden
4 then shifts, at step five, to the Commissioner to show that (1)
5 plaintiff can perform other substantial gainful activity and (2) a
6 "significant number of jobs exist in the national economy" which
7 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
8 Cir. 1984).

9 **STANDARD OF REVIEW**

10 Congress has provided a limited scope of judicial review of a
11 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
12 the Commissioner's decision, made through an ALJ, when the
13 determination is not based on legal error and is supported by
14 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
15 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
16 1999). "The [Commissioner's] determination that a plaintiff is
17 not disabled will be upheld if the findings of fact are supported
18 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
19 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
20 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
21 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
22 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
23 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
24 573, 576 (9th Cir. 1988). Substantial evidence "means such
25 evidence as a reasonable mind might accept as adequate to support
26 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
27 (citations omitted). "[S]uch inferences and conclusions as the
28 [Commissioner] may reasonably draw from the evidence" will also be

1 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

2 On review, the Court considers the record as a whole, not just the
3 evidence supporting the decision of the Commissioner. *Weetman v.*
4 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
5 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

6 It is the role of the trier of fact, not this Court, to
7 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
8 evidence supports more than one rational interpretation, the Court
9 may not substitute its judgment for that of the Commissioner.
10 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
11 (9th Cir. 1984). Nevertheless, a decision supported by
12 substantial evidence will still be set aside if the proper legal
13 standards were not applied in weighing the evidence and making the
14 decision. *Browner v. Secretary of Health and Human Services*, 839
15 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
16 evidence to support the administrative findings, or if there is
17 conflicting evidence that will support a finding of either
18 disability or nondisability, the finding of the Commissioner is
19 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
20 1987).

21 ALJ'S FINDINGS

22 At the outset, the ALJ found plaintiff met the DIB
23 requirements and was insured through March 31, 2008 (Tr. 21,23).
24 At step one, he found plaintiff has not engaged in substantial
25 gainful activity since onset (Tr. 23). At steps two and three,
26 the ALJ found plaintiff suffers from fibromyalgia, chronic
27 duodenitis, and history of gallbladder disease, status post
28 cholecystectomy in 1999, impairments that are severe but which do

1 not alone or combination meet or medically equal a Listing
2 impairment (Tr. 23,26). The ALJ found plaintiff less than
3 completely credible (Tr. 29). At step four, relying on the VE,
4 the ALJ found Ms. Case is able to perform her past job as a
5 parking lot attendant, as this is a light job and she has an RFC
6 for a wide range of light work (Tr. 32). Alternatively, at step
7 five, again relying on the vocational expert, the ALJ found
8 plaintiff there are other jobs plaintiff could perform including
9 fast food worker, cashier, and two attendant positions, cafeteria
10 and counter (Tr. 34). Accordingly, the ALJ found plaintiff is not
11 disabled as defined by the Social Security Act (Tr. 35).

12 **ISSUE**

13 Plaintiff contends the Commissioner erred as a matter of law
14 by failing to properly credit the opinion of her treating
15 rheumatologist, Jeffrey B. Butler, M.D., specifically, Dr.
16 Butler's January of 2008 RFC assessment (Ct. Recs. 18 at 14-18; 24
17 at 1-4, referring to Tr. 656-664)). The Commissioner asserts
18 because the ALJ's decision is supported by substantial evidence
19 and free of error, the Court should affirm (Ct. Rec. 23 at 9).

20 ///

21 **DISCUSSION**

22 **A. Weighing medical evidence**

23 In social security proceedings, the claimant must prove the
24 existence of a physical or mental impairment by providing medical
25 evidence consisting of signs, symptoms, and laboratory findings;
26 the claimant's own statement of symptoms alone will not suffice.
27 20 C.F.R. § 416.908. The effects of all symptoms must be
28 evaluated on the basis of a medically determinable impairment

1 which can be shown to be the cause of the symptoms. 20 C.F.R. §
2 416.929. Once medical evidence of an underlying impairment has
3 been shown, medical findings are not required to support the
4 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
5 341, 345 (9th Cir. 1991).

6 A treating physician's opinion is given special weight
7 because of familiarity with the claimant and the claimant's
8 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
9 Cir. 1989). However, the treating physician's opinion is not
10 "necessarily conclusive as to either a physical condition or the
11 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
12 751 (9th Cir. 1989) (citations omitted). More weight is given to
13 a treating physician than an examining physician. *Lester v.*
14 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
15 weight is given to the opinions of treating and examining
16 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
17 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
18 physician's opinions are not contradicted, they can be rejected
19 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
20 If contradicted, the ALJ may reject an opinion if he states
21 specific, legitimate reasons that are supported by substantial
22 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
23 F. 3d 1435, 1463 (9th Cir. 1995).

24 In addition to the testimony of a nonexamining medical
25 advisor, the ALJ must have other evidence to support a decision to
26 reject the opinion of a treating physician, such as laboratory
27 test results, contrary reports from examining physicians, and
28 testimony from the claimant that was inconsistent with the

1 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
2 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
3 Cir. 1995).

4 Treating rheumatologist's opinion

5 Plaintiff alleges the ALJ improperly rejected Dr. Butler's
6 opinion, particularly his January of 2008 RFC assessment (Ct. Rec.
7 18 at 14-18, referring to Tr. 656-659). She alleges Dr. Butler's
8 opinion was entitled to great weight because he is both a treating
9 physician and a specialist. Plaintiff acknowledges the ALJ was
10 required to give specific and legitimate reasons for rejecting Dr.
11 Butler's contradicted opinion; she alleges they are not.

12 Plaintiff argues if the opinion is properly given controlling
13 weight, she would be found disabled (Ct. Rec. 18 at 15-16).

14 The Commissioner argues the ALJ's reasons, including
15 conservative treatment, lack of supporting objective medical
16 evidence, plaintiff's lack of credibility, and contrary medical
17 opinions, are specific, legitimate and supported by substantial
18 evidence (Ct. Rec. 23 at 5-6).

19 Dr. Butler first saw plaintiff October 14, 2005, more than
20 two years after onset, after referral from Margaret Bruya, ARNP,
21 for evaluation of "systemic lupus erthematosus and the
22 antiphospholipid antibody syndrome" (lupus and APL syndrome) (Tr.
23 169, repeated at Tr. 183-187). Dr. Butler noted Ms. Case is
24 married with three children, ages 2, 3, and 5. She complains of
25 severe migraines every other day, depression, anxiety, pain, and
26 problems with sleep and memory (Tr. 169-170). He ordered tests
27 for lupus and APL syndrome, recommended progressive low impact
28 stretching and an aerobic exercise program, prescribed medication

1 for both sleep and APL syndrome (based on a past diagnosis), and
2 strongly encouraged her to stop smoking. She was to return in a
3 month (Tr. 172-173).

4 Dr. Butler points out Ms. Case returned five months later, on
5 March 20, 2006. He told her the laboratory tests were negative
6 for lupus and APL syndrome, and he found no evidence of
7 inflammatory arthritis. The evidence of fibromyalgia, on the
8 other hand, was unequivocal (Tr. 167-168, duplicated at Tr. 181-
9 182). Dr. Butler told Ms. Case her current narcotic pain
10 medication rarely helps fibromyalgia and recommended she stop
11 taking it. He prescribed a trial of lyrica, again stressed the
12 importance of regular aerobic exercise, and noted he would
13 consider adding SSRI antidepressants (Tr. 168).

14 At the next appointment on May 2, 2006, Dr. Butler observes
15 Ms. Case quit taking lyrica after a month due to "perceived" lack
16 of benefit. He opined the trial may have been too short. Ms.
17 Case appeared depressed, was not exercising and "remains quite
18 sedentary." Dr. Butler again prescribed an aerobic exercise
19 program, began an antidepressant (effexor), and scheduled follow
20 up in two months (Tr. 165, repeated at 179).

21 Plaintiff returned ten months later, on March 27, 2007 (Tr.
22 650). Dr. Butler notes Ms. Case was scheduled for right knee
23 surgery the next day; complained of persistent fatigue and
24 widespread arthralgias and myalgias; and her grip strength was
25 intact on examination (Tr. 650,652). He opined poor posture and
26 large breasts could predispose plaintiff to thoracic outlet
27 syndrome (Tr. 653). Dr. Butler started a trial of cymbalta and
28 trazedone, ordered nerve conduction studies, and again prescribed

1 an aerobic exercise program (Tr. 653).

2 Ten months later, on January 17, 2008, Dr. Butler opined
3 plaintiff has "fibromyalgia with chronic neck and back pain as
4 well as bilateral shoulder impingement. She should remain active
5 and uninterrupted sitting is not recommended" (Tr. 657). He
6 opined plaintiff could lift 20 pounds occasionally, less than 10
7 frequently, standing and walking are not affected, sitting and
8 standing must alternate, and pushing and pulling are limited by
9 shoulder impingement. Plaintiff can use stairs occasionally, but
10 should never kneel, crouch, crawl or stoop; reaching is limited in
11 all directions, and handling, fingering and feeling are unlimited.
12 Dr. Butler notes there is no record of the nerve conduction
13 studies he previously ordered, plaintiff is not currently
14 exercising and is applying for disability (Tr. 656-658, 661).

15 The Commissioner observes Dr. Butler assessed shoulder-
16 related limitations in January of 2008, more than four years after
17 onset. The ALJ rejected the assessed limitations both because
18 they were not diagnosed until 4 years after onset and were treated
19 conservatively. The ALJ considered plaintiff's credibility when
20 he weighed Dr. Butler's RFC, to the extent he (Butler) relied on
21 Ms. Case's unreliable statements when he assessed her limitations.
22 And, the Commissioner observes, the ALJ relied on the opinions of
23 other professionals, including an examining psychologist and the
24 testifying medical experts when he evaluated Dr. Butler's RFC (Ct.
25 Rec. 23 at 5-7). The Commissioner argues any error by the ALJ in
26 weighing Dr. Butler's opinion is harmless (Ct. Rec. 23 at 7).

27 Although the treating physician's opinion is entitled to
28 great deference, it is not necessarily conclusive as to the

1 question of disability. *Magallanes v. Bowen*, 881 F.2d 747,751
2 (9th Cir. 1989). An impairment for which a claimant receives only
3 conservative treatment is a specific and legitimate reason to
4 reject an opinion the impairment is disabling. See *Johnson v.*
5 *Shalala*, 60 F.3d 1428,1434 (9th Cir. 1995)(that the claimant
6 received only conservative treatment for back injury is a clear
7 and convincing reason for disregarding testimony that the claimant
8 is disabled). The ALJ's reason is proper.

9 To aid in weighing the conflicting medical evidence, the ALJ
10 evaluated plaintiff's credibility and found her less than fully
11 credible (Tr. 29). Credibility determinations bear on evaluations
12 of medical evidence when an ALJ is presented with conflicting
13 medical opinions or inconsistency between a claimant's subjective
14 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.
15 3d 683, 688 (9th Cir. 2005).

16 It is the province of the ALJ to make credibility
17 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
18 1995). However, the ALJ's findings must be supported by specific
19 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
20 Cir. 1990). Once the claimant produces medical evidence of an
21 underlying medical impairment, the ALJ may not discredit testimony
22 as to the severity of an impairment because it is unsupported by
23 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
24 1998). Absent affirmative evidence of malingering, the ALJ's
25 reasons for rejecting the claimant's testimony must be "clear and
26 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
27 "General findings are insufficient: rather the ALJ must identify
28 what testimony not credible and what evidence undermines the

1 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
2 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

3 Plaintiff does not challenge the ALJ's credibility assessment
4 on appeal (Ct. Rec. 23 at 6). The ALJ points out plaintiff's test
5 results for malingering were positive in all but one test
6 administered by examining psychologist Joyce Everhart, Ph.D. (Tr.
7 24), meaning he was required to give specific, legitimate reasons
8 for finding plaintiff less than fully credible. Even under the
9 more rigorous clear and convincing standard, ALJ Reed's
10 credibility assessment is fully supported.

11 Some of the ALJ's reasons include activities inconsistent
12 with claimed impairments, statements inconsistent with objective
13 medical evidence, inconsistent statements to providers, and test
14 results indicating malingering (Tr. 29-32). Each is fully
15 supported.

16 The ALJ points out plaintiff testified her knees still "give
17 out" on occasion, neck pain causes her to drop things, she has
18 problems grasping, and can do tasks only 2 hours a day (Tr. 27).
19 ALJ Reed observes plaintiff's activities during the relevant
20 period included helping mount the transmission in her van and
21 riding her father's motorcycle in May of 2005, almost 2 years
22 after onset (Tr. 30, referring to Exhibit 2F). He notes plaintiff
23 reported, also in May of 2005, she cared for three children in her
24 home, ages 2, 3, and 4¹, including changing diapers, cooking,
25 running baths and putting them to bed. She played pool
26 (billiards) on a team for 3-5 hours weekly (Tr. 28-29, referring
27

28 ¹Plaintiff and her husband apparently had custody of two
nephews and their son (Tr. 840).
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1 to Tr. 119-120; Tr. 253). Plaintiff described these activities to
2 her physical therapist, ER doctors, and in her disability report.
3 The ALJ observes despite plaintiff's testimony she has only two
4 hours a day when she can perform tasks, as a result of pain, she
5 testified she is still able to play pool for 3-5 hours once a week
6 (Tr. 27). The ability to engage in activities inconsistent with
7 allegedly disabling symptoms is an appropriate reason to discount
8 credibility. *Thomas v. Barnhart*, 278 F.3d 947,958-959 (9th Cir.
9 2002).

10 ALJ Reed points out plaintiff's statements are often
11 contradicted by the objective evidence (Tr. 32). The "plethora"
12 of diagnostic medical tests performed based on plaintiff's
13 subjective complaints were negative, including a recent cervical
14 MRI, diminishing plaintiff's credibility (Tr. 32, referring to Tr.
15 747, 843). The ALJ observes plaintiff testified she has lupus and
16 APL syndrome, two of the three main reasons (in addition to
17 fibromyalgia) she cannot work, yet after testing Dr. Butler told
18 Ms. Case on March 20, 2006, she did not carry either diagnosis
19 (Tr. 32); *cf.* Tr. 168 with Tr. 833-834. This reason is specific
20 and legitimate. Contradiction with the medical record is a
21 sufficient basis for rejecting the claimant's subjective
22 testimony. *Carmickle v. Comm. of Soc. Security*, 553 F.3d 1155,
23 1161 (9th Cir. 2008), *citing Johnson v. Shalala*, 60 F.3d 1428,1434
24 (9th Cir. 1995).

25 The ALJ opines Dr. Everhart's malingered diagnosis is
26 supported by the concern expressed by treating surgeon Patrick
27 Lynch, Jr., in December of 2005. Dr. Lynch was "a bit surprised
28 she is not 100% at this point" recovered from the knee surgery he

1 performed in August of 2005 (Tr. 31, referring to Tr. 206).

2 The ALJ's reasons for finding plaintiff less than fully
3 credible are clear, convincing, and fully supported by the record.
4 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
5 2002)(proper factors include inconsistencies in plaintiff's
6 statements, inconsistencies between statements and conduct, and
7 extent of daily activities). Noncompliance with medical care or
8 unexplained or inadequately explained reasons for failing to seek
9 medical treatment also cast doubt on a claimant's subjective
10 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.
11 2d 597, 603 (9th Cir. 1989).

12 If properly supported, the ALJ's credibility determination is
13 entitled to "great deference". See *Green v. Heckler*, 803 F.2d
14 528,532 (9th Cir. 1986). Here, the ALJ's unchallenged credibility
15 determination is free of error and fully supported by the record.
16 The ALJ found Dr. Butler's RFC is based at least partially on
17 plaintiff's less than credible subjective complaints (Tr. 31-32).
18 This reason is specific and legitimate. *Tommasetti v. Astrue*, 533
19 F.3d 1035,1040 (9th Cir. 2008).

20 The ALJ considered the opinions of the testifying medical
21 experts when he weighed Dr. Butler's RFC (Tr. 30-32). Dr. Rodkey
22 assessed an RFC for sedentary work, an RFC he considered
23 applicable at all times. He noted plaintiff's many credibility
24 problems, including the strenuous activities she reported to her
25 physical therapist and Dr. Lynch's concern about the apparent lack
26 of treatment progress long after surgery. Dr. Rodkey observed
27 plaintiff's upper endoscopy was normal despite complaints of GERD.
28 (Tr. 843-845.)

1 The ALJ notes Dr. Toomajian assessed an RFC for light work,
2 applicable to the prior 3-4 years (Tr. 30,32, referring to Tr.
3 818, 820-821). The ALJ considered the opinion of reviewing agency
4 physician Gregory Saue, M.D., (Tr. 24,32, referring to Tr. 149-
5 154,157-163). Dr. Saue points out "embellishment is suggested"
6 (Tr. 149). Dr. Saue points out a treatment provider opined
7 plaintiff's weakness on examination in all extremities was likely
8 due to poor effort (Tr. 24, 29, 32, Dr. Saue's opinion at Tr. 159,
9 treatment provider Margaret Collyer, ARNP's August 23, 2004
10 opinion, about a year after onset, at Tr. 280).

11 To the extent the ALJ rejected Dr. Butler's January 2008 RFC,
12 his reasons are specific and legitimate. See e.g., *Tommasetti*,
13 533 F.3d at 1040 (an opinion may properly be rejected when based
14 on a claimant's unreliable subjective complaints); *Johnson v.*
15 *Shalala*, 60 F.3d at 1434 (conservative treatment for an impairment
16 provides valid reason to disregard opinion claimant is disabled
17 as a result); *Batson v. Social Security Administration*, 359 F.3d
18 1190 (9th Cir. 2004) (contradictory examination results by another
19 physician is a specific and legitimate reason to discount a
20 treating physician's opinion); and *Bunnell v. Sullivan*, 947 F.2d
21 at 345-347 (absence of objective findings one valid factor to
22 consider in assessing degree of limitation, as long as not the
23 sole reason).

24 Plaintiff argues the ALJ's rejection of Dr. Butler's opinion
25 because her attorney requested it for litigation, and because Dr.
26 Butler benevolently wished to assist his patient, are both
27 erroneous (Ct. Rec. 18 at 15-17, referring to Tr. 32). In the
28 Court's view, given the volume of evidence contrary to Dr.

1 Butler's RFC, this is at most harmless error. Harmless errors do
2 not change the outcome of a case and do not warrant reversal of
3 the ALJ's decision. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th
4 Cir. 2005).

5 The ALJ is responsible for reviewing the evidence and
6 resolving conflicts or ambiguities in testimony. *Magallanes v.*
7 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
8 trier of fact, not this court, to resolve conflicts in evidence.
9 *Richardson*, 402 U.S. at 400. The court has a limited role in
10 determining whether the ALJ's decision is supported by substantial
11 evidence and may not substitute its own judgment for that of the
12 ALJ, even if it might justifiably have reached a different result
13 upon de novo review. 42 U.S.C. § 405 (g).

14 The ALJ's reasons for rejecting some of Dr. Butler's
15 contradicted assessed limitations are specific, legitimate, and
16 supported by substantial evidence. The ALJ's unchallenged
17 credibility assessment is without error.

18 To the extent plaintiff argues the ALJ's step four finding
19 is flawed, the alternative step five finding is fully supported by
20 the record and free of legal error.

21 CONCLUSION

22 Having reviewed the record and the ALJ's conclusions, this
23 Court finds the ALJ's decision is free of legal error and
24 supported by substantial evidence..

25 IT IS ORDERED:

26 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is
27 **GRANTED.**

28 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is

1 **DENIED.**

2 The District Court Executive is directed to file this Order,
3 provide copies to counsel for plaintiff and defendant, enter
4 judgment in favor of Defendant, and **CLOSE** this file.

5 DATED this 2nd day of March, 2010.

6
7 s/ James P. Hutton
8 JAMES P. HUTTON
9 UNITED STATES MAGISTRATE JUDGE
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